

Chapter II

Substantive law surrounding immunity **in international criminal law**

1. Immunity in legal acts – the statuses of the International Criminal Court and other Tribunals

a. Evaluation of the legal provisions on immunities in international criminal law

Immunity, being a valid argument in the discussion about individual criminal responsibility in international law, is a matter which had to be regulated for the purposes of the international courts. Despite a different rationale for the binding nature of the legal instruments establishing them, the final outcome remains unchanged: immunity shall not constitute a bar to prosecution or be a reason for mitigation of the punishment when a head of state is charged with commission of an international crime. This, as it will be seen below, flows from provisions in the Statutes of the ICC and the *ad hoc* Tribunals as well as the hybrid Special Court of Sierra Leone. The binding power of these seems to be the main issue here, especially when immunity is considered as one of the sovereign attributes of the state. Whilst the ICTY and the ICTR were constituted by the UN Security Council by a resolution under Chapter VII of the Charter and derive the power to overcome immunities from it, the ICC was created by the states themselves pursuant to their common will of punishing international criminals.

The ad hoc tribunals: the ICTY and the ICTR. Quite a simple solution to the problem of personal immunity (as functional immunity is said to be inapplicable when faced with international crimes charges) exists in the *ad hoc* Tribunals. They were created by the UN Security Council's Resolutions and are agreed to be measures under Chapter VII of the Charter. The Council has a discretionary power of choosing the right measures of action of the UN Members in order to restore peace, prevent aggravation of aggression or other similar situations. It may either choose peaceful means or decide to use force.¹¹⁵ Moreover, the Members are generally obliged to act in consistency with the Council's decisions

¹¹⁵ Art. 41 & 42 of the UN *Charter of the United Nations*, 26.06.1945, 1 UNTS XVI.

as provided in Article 25. Additionally, by virtue of Article 103 of the Charter, these obligations are paramount to other international obligations of the UN Member States, and so the States must comply with the request of the Security Council also when it conflicts with a different duty.¹¹⁶ The above is of a great importance when the provisions in the Statutes relating to immunities are considered. It is accepted by the scholars that such basis of means through Chapter VII of the Charter establishes a valid relinquishment of personal immunity, with which the Member States must comply.¹¹⁷ The identical wording of immunity-related provisions in both the ICTY and ICTR Statutes as well as the same origin of these documents justifies a joint point of view over the *ad hoc* Tribunals. Article 7 paragraphs 2 and 4 of the ICTY Statute (and Article 6 of the ICTR Statute respectively) states that:

‘2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. (...)’¹¹⁸

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.’

It is noticeable that immunity *ratione personae* otherwise granted to high state officials is here deemed to be inapplicable and in particular cannot constitute a legal means of avoiding the individual responsibility or granting any sort of exculpation, even when only lowering the possible sentence. There are no exceptions to this rule, especially for the request of surrender.¹¹⁹ Paragraph 2 of this Article among its personal scope enumerates heads of state, heads of government or a responsible government official, which does not necessarily mean a high state official, but someone awarded significant power and authority to act on behalf of the state, e.g. a minister. This is a broad range of persons who cannot rely on immunities and what is more it is not limited to those state agents only, as the provision gives examples preceded by the word ‘any’. One may say, that the purpose of this Article is to exclude such defence-based arguments at all when proceeding in front of the *ad hoc*

¹¹⁶ R. Cryer *et al.*, *op. cit.*, p. 439.

¹¹⁷ This way e.g. R. von Alebeek, *op. cit.*, p. 277-278 or R. Cryer *et al.*, *op. cit.*, p. 439. It was noted by the latter that Federal Republic of Yugoslavia is bound to comply with UN SC Resolutions through the Dayton Accords, which imposed an obligation to cooperate with the ICTY.

¹¹⁸ This paragraph provides for the responsibility when superior order is concerned, thus it stays outside the scope of this thesis.

¹¹⁹ R. Cryer *et al.*, *op. cit.*, p. 439.

Tribunals are concerned. This may be read together with paragraph 4 of the Article, which – although not directly related to immunities – refers to a person acting in accordance with an order of a government. This stresses the fact of the extensive scope of the Article in question.¹²⁰

The most well-known case in front of the ICTY dealing with a head of state is the one of Slobodan Milošević. He was the President of the Federal Republic of Yugoslavia at the time he was charged with the commission of international crimes in Kosovo such as crimes against humanity and violations of the laws or customs of war.¹²¹ The circumstances being such, Milošević was indeed the first sitting head of state ever on whom an indictment was made.¹²² The fact that he was nevertheless arrested and put in front of the Tribunal proves the strength of the UN Security Council powers when acting under the discretion provided for in Chapter VII.¹²³

The ICTY has also dealt with another intriguing case, i.e. that of Radovan Karadžić.¹²⁴ The accused was the first President of Republic of Serbia once it had declared independence. Whilst in office, he is alleged to have committed a plethora of international crimes, among them crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws of war. He left the office in 1996, a year after an indictment was issued by the ICTY. When in trial, he claimed to be protected by an agreement with a US representative in which he was promised to be made immune from prosecution.¹²⁵ It was stated in the Decision that no immunity agreement is to be respected when severe international crimes are under the consideration of an international tribunal, as they would be deemed invalid under international law.¹²⁶ Although such a statement kept the possibility of prosecuting the accused open, a few objections have been made by some scholars. Brockman-Hawe claims that it was

¹²⁰ An opportunity of mitigation of the punishment is provided therein and it is up to the Tribunal's assessment of justice to diminish the sentence. An absolute avoidance of responsibility is unattainable.

¹²¹ *The Prosecutor of the Tribunal against Slobodan Milošević et al.*, Indictment, case no. IT-99-37, 22.05.1999; see: http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm, accessed on 28.12.2010.

¹²² *Case Information Sheet on "Kosovo, Croatia & Bosnia" (IT-02-54) Slobodan Milošević*, p. 1 and 3; see: http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf, accessed on 28.12.2010.

¹²³ An interesting opinion on the consequences of the unfinished trial of Milošević may be found in an article by G. Boas *Moving on from Milosevic*, 75 *Euro. Law.* 2008. The author, who was the senior advisor to the Trial Chamber on the Milošević case, evaluates on the difficulties encountered during the trial and the possible lessons that should be taken into account in further cases of such complex nature.

¹²⁴ *Prosecutor v. Radovan Karadžić, Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue*, Trial Chamber, case no. IT-95-5/18-PT, 17.12.2008, see: <http://www.icty.org/x/cases/karadzic/tdec/en/081217.pdf>, accessed on 2.03.2011.

¹²⁵ B. Brockman-Hawe *Case Comment. International Criminal Tribunal for the former Yugoslavia: decision on the accused's second motion for inspection and disclosure – immunity issue – Trial Chamber decision of 17 December 2008*, 58(3) *I.C.L.Q.* 2009, p.726-727.

¹²⁶ *Prosecutor v. Radovan Karadžić...*, para. 25.

a question of amnesty rather than immunity that should have been decided upon by the Tribunal. Moreover, he intends to demonstrate the Trial Chamber's mistake in choosing the law and cases applicable. According to the author, no customary international rule prohibiting amnesty for the purposes of international courts exists, as opposed to the presupposition taken by the Court.¹²⁷ Notwithstanding the aforementioned objections, the wording of this Decision has once again confirmed the lack of immunity in the proceedings related to international crimes.

The Special Court for Sierra Leone. The Special Court for Sierra Leone (hereinafter the SCSL) is another institution that deals with international crimes of great gravity. It is considered to be a hybrid court, i.e. one that consists of judges of mixed origins – both national and international. Some of the judges are appointed by the Government of Sierra Leone and the others by the Secretary-General of the UN.¹²⁸ The creation of this Court followed Security Council Resolution 1315 of August 2000 on the basis of an agreement between Sierra Leone and the United Nations. The wording of its Statute is very similar to the Statutes of the ICTY and the ICTR. Article 6, entitled 'International criminal responsibility', is in fact a copy of those in the aforementioned documents,¹²⁹ thus the remarks above stay relevant herein as well.

The case that the SCSL is most known for is that of Charles Taylor. The Court issued an indictment for him in March 2003 and it was subsequently unsealed by the Prosecutor in June 2003. At that time Taylor was the incumbent President of Liberia and was visiting Ghana. A month later an application on behalf of Taylor was made to the Court in order to quash the indictment on basis that he was protected by immunity as a sitting head of state. Eventually, in August 2003 he stepped down from the office and went to Nigeria, which had offered him asylum. The decision of the Court was taken in May 2004 and it was clearly stated that no protection may be given to Taylor. However, the grounds on which the Appeals Chamber based its conclusions are criticised for a number of reasons.

In accordance with the arguments proposed by the defence, the Court aimed at establishing the international nature of the SCSL in the first place and consequently assessing the issue of immunity. By invoking the participation of the UN together with the

¹²⁷ B. Brockman-Hawe, *op. cit.*, p.730.

¹²⁸ Art. 12 of the SCSL Statute.

¹²⁹ There is only one difference in the structure of the Article 6 – paragraph 5 was added and it reads as follows: '5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.' One may therefore state that this paragraph is specific for the purposes of the SCSL and its individual jurisdiction.

Government of Sierra Leone in the creation of the Court as well as confirming the reasoning of *amicus curiae* (Professor Sands enumerated many characteristic features of international courts many of which applied directly to the Court), the Appeals Chamber came to the conclusion that the SCSL is indeed of international nature.¹³⁰ Such a decision was inevitable to be able to move onto another important matter of the case, namely the immunity of the President. Here, the Appeals Chamber distinguished the application of immunities for the purposes of national courts from the one for international courts. The Court, having conducted extensive research on the wording of the Articles regarding immunities in other Statutes of international courts such as the Nuremberg Tribunal, the *ad hoc* Tribunals and the ICC and comparing them with the relevant Article 6(2) of its Statute – stated in paragraph 53 that:

‘(...) Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court. We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone.’¹³¹

The Court assumed there is a rule according to which immunities do not apply in front of international courts and thus established its possibility to prosecute Taylor. According to the Appeals Chamber, it may be derived from the reasoning presented in the Yerodia Case. This point was criticised by some authors commenting on the case. There is an inconsistency in the main argument establishing the competency of the Court to overrule Taylor’s immunities: either the unique powers of the UN Security Council under Chapter VII or the international nature of the SCSL meeting the requirements set out in the Yerodia Case.¹³² The Court’s final conclusion raises also doubts for another reason, namely its possible outcomes. Was it intended to confirm the existence of a rule that generally eliminates the immunities in proceedings of an international court? Perhaps the Appeals Chamber observed the fact that some courts are equipped with special instruments allowing them to do so (which may stem for example from the powers of the UN SC or from an agreement of the states concluded with

¹³⁰ *Prosecutor against Charles G. Taylor, Decision on immunity from jurisdiction*, Appeals Chamber, case no. SCSL-2003-01-I, 31.05.2004, paras. 37-42.

¹³¹ *Ibidem*, para. 53.

¹³² M. Frulli *The question of Charles Taylor’s immunity: still in search of a balanced application of personal immunities?*, 2(4) J.I.C.J. 2004, p. 1123.

a treaty)?¹³³ The latter seems to be a more reasonable answer since it has been proved both by the way the ICTY and the ICTR were created and by the wording of the ICC Statute. Some unanswered questions are left when the former proposition is considered. Firstly, such ‘general international court exception to immunities’ would amount to a violation of the principle according to which no third party can be affected by an agreement between other parties. The creation of an international tribunal could affect those not linked to it and somehow force them into accepting the action of other subjects of the international community. Secondly, which results from the above, such a court would enjoy powers that do not originate from the states’ competency. To overrule immunity in this case is to have supremacy over another state and among states that are both equal and sovereign it is not accepted. Thirdly, as long as functional immunity in this case is irrelevant because the proceedings at issue take place in front of international court, personal immunity is absolute in its character and it is of a higher importance to assure a safe exercise of the state’s functions in the international arena. Finally, to deprive the basis of the third argument – there is no commonly known test for an establishment of an international court. It is difficult to assess which court is sufficiently international and what features need to be taken into account.¹³⁴ When all of the above are evaluated, one may come to a conclusion that in the Taylor case the SCSL failed to clarify the vital questions on immunity. Notwithstanding the understandable final decision that the case is accessible (which could have been reached by different means¹³⁵), the failure to give a convincing rationale or a concise approach to solving such problems is not satisfactory for cases that may arise in the future.

The International Criminal Court. The Rome Statute has a completely different nature than the aforementioned Statutes. The ICC was created by means of a treaty that is binding to all the State-Parties. Its obligatory nature stems from Article 26 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the VCLT), which is considered to be ‘a definition of the very essence of treaties’ and presents the principle *pacta sunt servanda*.¹³⁶ The Statute of the ICC was adopted in Rome in 1998 and entered into force on 1 July 2002 after being ratified by a group of sixty states. There are two Articles relating to the problem of immunities in this document – Article 27, titled ‘Irrelevance of official capacity’, and Article 98(1) which is on the ‘cooperation with respect to waiver of immunity

¹³³ R. Cryer *et al.*, *op. cit.*, p. 442.

¹³⁴ *Ibidem*, p. 442-443.

¹³⁵ See: *Ibidem*, p. 444.

¹³⁶ W. Czapliński, A. Wyrozumska *op. cit.*, p. 476.

and consent to surrender'. What is noticeable here is the fact that in the previously mentioned Statutes the provision about immunities is placed in an article that constitutes a general rule of individual criminal responsibility. In the Rome Statute however, these are two separate provisions; the principle of individual criminal responsibility is expressed in Article 25. This may be because the states wanted to stress the relinquishment of immunities more and, in order to achieve this, decided to dedicate an individual space for this purpose.

The main provision concerning immunities is Article 27 consisting of two paragraphs. The need for such a distinction is assessed differently by the scholars and it depends on the character of the criterion applied. Article 27(1) reads as follows:

'This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

This provision is in line with previous norms present in the laws governing the Nuremberg trials or the Genocide Conventions (Art. 4). It is also similar to those in the Statutes of the *ad hoc* Tribunals.¹³⁷ Constituting a sort of a model in international criminal law, this paragraph directly relates to the issue of state officials' individual liability for the crimes committed by them.¹³⁸ The scholars agree that it lifts immunity *ratione materiae*¹³⁹, cancelling in this way the possibility of avoiding the responsibility by a presumption of acting on behalf of the state and relying on the Act of State doctrine.¹⁴⁰ Taking into account the Preamble of the Rome Statute,¹⁴¹ this paragraph roughly confirms the rule of international customary law which generally excludes the usage of functional immunity when its existence is brought into consideration when a person is charged with commission of international crimes.¹⁴² It was indeed due to the unique historical circumstances and the need of exposing

¹³⁷ W. A. Schabas *Oxford Commentaries on International Law. The International Criminal Court. A Commentary on the Rome Statute*, New York 2010, p. 448.

¹³⁸ D. Akande *International Law Immunities...*, p. 419.

¹³⁹ *Ibidem* and P. Gaeta *Official Capacity*, p. 990.

¹⁴⁰ On the Act of State doctrine with regards to the ICC, see: D. Akande *The jurisdiction of the International Criminal Court over nationals of non-parties: legal basis and limits*, 1(3) J.I.C.J. 2003, p. 638-640.

¹⁴¹ Paragraph 5 states: '[The States Parties to this Statute], determined to put an end to impunity for the perpetrators of these crimes and Hus to contribute to the prevention of such crimes...'

¹⁴² See the notion of the sensible rule justifying the lack of functional immunity in the international criminal law according to S. Wirth *Immunities, related problems, and article 98 of the Rome Statute*, 12(4) C.L.F. 2001, p. 445-446.

the customary nature of this norm that such a provision, according to the majority of scholars, was placed in a separate paragraph.

The personal scope of Art. 27(1) is very wide. Enumerated are: heads of state or government, members of a government or parliament, elected representatives or government officials – this is however an open list, to which very often representatives of international organisations are added. In fact, it seems impossible to find a category that, in particular when using *a maiori ad minus* inference, would not fall within the groups included therein. Moreover, Schabas stretches the application of this norm to cover all persons that could possibly raise the immunity argument, i.e. *de facto* heads of states.¹⁴³ The author claims that the final wording of Art. 27(1) – that exercising of the previously mentioned functions ‘shall [in no case], in and of itself, constitute a ground for reduction of sentence’ – is simply a confirmation of the obvious conclusions drawn from the beginning of the provision. Indeed, very often in practice the performance of official duties when intertwined with the commission of an international crime constitutes a factor qualifying the deed as one of greater gravity.¹⁴⁴ Schabas also suggests considering paragraph 1 as applying to national immunities, i.e. coming from the national laws, only. As a norm that relates to international law immunities he regards Art. 27(2).¹⁴⁵

Article 27 paragraph 2 of the Rome Statute states:

‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’¹⁴⁶

The literal interpretation of this provision shows that it is related to personal immunity. It is consistent with the former paragraph’s meaning – the relinquishment of functional immunity. According to Gaeta, it amounts to a direct confirmation of the international law rule, namely the norm that the argument of immunity may only be raised towards a state and its institutions, especially its courts. Thus, its non-application to the ICC as an international organisation is rather obvious.¹⁴⁷ Akande claims this Article ‘constitutes a waiver by state parties of any immunity that their officials would otherwise possess vis-à-vis the ICC’¹⁴⁸ (and only in relation to it). Such an understanding is indicated by the fact that in the Statutes of the *ad hoc* Tribunals there is not any similar regulation. Because this norm is to be valid only

¹⁴³ W. A. Schabas, *op. cit.*, p. 448.

¹⁴⁴ *Ibidem*, p. 449.

¹⁴⁵ *Ibidem*.

¹⁴⁶ Emphasis added.

¹⁴⁷ P. Gaeta *Official capacity...*, p. 991.

¹⁴⁸ D. Akande *International Law Immunities...*, p. 420.

on the line between a State-Party and the ICC, beyond its scope stay the clear interstate relations and other – between the states and other subjects of international law. As a consequence, the immunity at issue originates from customary international law, not the internal law of a state. Schabas agrees with the above, notwithstanding the fact that the text of paragraph 2 includes in its wording immunities emanating both internationally and nationally.¹⁴⁹

Eliminating the protection by personal immunity in front of the ICC is not the only significance of this Article. According to Wirth, the State-Parties are also bound by a negative obligation, i.e. not to create any new immunities or privileges in their national laws.¹⁵⁰ This would be evidently contrary to the previous ratification of the treaty. Some scholars also point out other outcomes of Article 27, especially in the national laws of the countries that have signed the Rome Statute.¹⁵¹

One would be wrong however to think that a norm included in this provision has no relevance to relations between the states. A direct relationship between Article 27 and the norm inherent in Article 98(1) of the ICC Statute is underlined by the doctrine as well as the need to read them together.

b. The relationship between Article 27 and Article 98(1) of the ICC Statute

Article 98 of the Rome Statute is placed in Part 9 relating to international cooperation and judicial assistance. The International Criminal Court neither has any instruments which would allow it to exercise its jurisdiction over third parties to the Statute without their consent nor it is capable of using measures of coercion. It was created by the states and only thanks to them it may operate. At the same time, only State-Parties are bound by the Rome Statute. In general, the ICC does not have jurisdiction over non-Member States, in accordance with the *pacta tertiis nec nocent nec prosunt* principle.¹⁵² Nonetheless, the Statute itself provides for three circumstances in which its jurisdiction over these states is justified. Firstly, Article 13 states it is possible for the UN Security Council to refer a situation to the ICC by means of a resolution. Secondly, when commission of an international crime is alleged¹⁵³ to have

¹⁴⁹ W. A. Schabas, *op. cit.*, p. 449.

¹⁵⁰ S. Wirth, *op. cit.*, p. 452.

¹⁵¹ See more: P. Gaeta *Official Capacity...*, p. 996-1000 or D. Akande *International Law Immunities...*, p. 422 and 425-426.

¹⁵² S. Wirth, *op. cit.*, p. 453.

¹⁵³ Genocide constitutes an exception to this rule as its prosecution originates from customary law, and so the prove of territoriality principle is not inevitable. See more: *Ibidem*.

happened on the territory of a State-Party.¹⁵⁴ Thirdly, the non-Member State may consent to the ICC's jurisdiction with respect to a specific criminal deed that the nationals of this State were charged with; this would be on the basis of the voluntary cooperation.¹⁵⁵ As was rightly noted by the literature on the matter, a separate circumstance, although not explicitly mentioned in the Statute, is the situation of a former state official. For he or she would have already left his office, he is no longer protected by personal immunity and for the reasons of international criminal law he does not enjoy *ratione materiae* immunity either.¹⁵⁶

There is no possibility for the ICC to hold a trial *in absentia*. As a consequence, it needs to be equipped with some means of assuring that the accused is present in the court room. With the exception of the unlikely situation in which the defendant voluntarily appears at a hearing (even though he could probably raise the argument of immunity), the ICC has to rely on the means of coercion that essentially belong to the State-Parties. This is the reason for which the States' obligation to cooperate with the Court is provided in Part 9 of the Rome Statute.

As far as immunities of high state officials are concerned only paragraph 1 of this Article is vital.

'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'¹⁵⁷

A conspicuous problem stands out on the first reading of this provision. If Article 27(2) unequivocally cancels the possibility of raising the immunity argument, then why does Article 98(1) somehow preclude the obligation to cooperate, additionally justifying it by the need to respect the State's or diplomatic immunity? The scholars concur in the necessity to read these provisions together, bearing in mind their aim, character and the rationale for their distinction. They are interrelated and interdependent.

Understanding the notion of 'a third State' used in the wording of Article 98(1) seems to be a solution to the problem of the relationship between these provisions. Two possible

¹⁵⁴ Art. 12(2)(a) and (3) of the Rome Statute.

¹⁵⁵ *Ibidem*.

¹⁵⁶ R. Cryer *et al.*, *op. cit.*, p. 441.

¹⁵⁷ Emphasis added.

meanings are suggested: it indicates either the state to which the Court did not expressly asked for surrender or assistance, or all states that remain outside the Rome Statute, i.e. are not Member-States and are not willing to voluntarily cooperate with the ICC.¹⁵⁸

The first of the propositions above is supported by the systematic internal interpretation that takes into account only the text of the Statute solely. As has rightly been noted by Gaeta, when the text refers to its non-signatory states it simply calls them ‘the States not parties to this Statute’.¹⁵⁹ One could therefore infer the existence of two relationships in Art. 98(1). The first is between the ICC and the requested state, the second, being a logical outcome of the former, is between the requested state and a third state (i.e. the state which is supposed to be affected by the ICC’s action). As a result, in the scope of this notion included are also the State-Parties, e.g. those that have denied to surrender their national who is sought by the Court’s request. In this interpretation the requested state (whether a State-Party or not) must waive immunity every time as a condition *sine qua non* for the exercise of the Court’s jurisdiction.¹⁶⁰ Herein, the scope of Art. 27(2) is very limited. It could only be used in very unlikely situations,¹⁶¹ and – most importantly – in this way art. 98(1) itself ‘bars the Court from exercising its jurisdiction’. Thus, it would absurdly contradict the previous elimination of immunities provided for by Art. 27 of the ICC Statute.¹⁶² To sum up, such a result of the systematic internal interpretation is contrary to the teleological interpretation and, as a matter of fact, textual as well.¹⁶³ These should therefore be employed so that the rationale behind both of them remains clear. Thus, a different understanding of ‘a third State’ shall be accepted, namely the most colloquial one.

The ICC Statute is an international treaty which the states are free to join. Entering it means an implicit agreement to be bound by all of the provisions therein, together with their logical consequences. This has no impact however on the relationships between the signatories and other countries – those having no link to the ICC. It stays outside the interest of the Court. In the relationship between a State-Party and a non-Member-State general international norms would apply, for example customary law or other instruments

¹⁵⁸ P. Gaeta *Official capacity...*, p. 993-995.

¹⁵⁹ *Ibidem*, p. 993.

¹⁶⁰ *Ibidem*.

¹⁶¹ Akande lists here a request for surrender aimed at subjects other than states and a voluntary appearance of one protected by immunity. It seems evident that in practice these situations are in minority, if they ever happen at all. See: D. Akande *International Law Immunities...*, p. 425.

¹⁶² P. Gaeta *Official Capacity...*, p. 993.

¹⁶³ In particular the directive prohibiting *per non est* interpretation is clear in here. It forbids from understanding the text in a way that some parts seem unnecessary and should be omitted.

of international law that these particular parties are both connected by. An international treaty, according to Article 30 of the VCLT, may however be in conflict with other relevant norms of international law. This provision solves the issues that may arise. In fact, this is the situation that is created by Article 98(1). It eliminates the possibility of a State-Party having to choose between the obligation to cooperate from Part 9 of the Rome Statute and other ‘obligations under international law’.¹⁶⁴ Therefore, this norm protects in a way the obligations of State-Parties with regards to states that are not signatory. That interpretation, relying on the principle of effectiveness, is widely accepted by the scholars.¹⁶⁵ Since Article 27(2) explicitly relinquishes the immunity *ratione personae* argument for the officials of a State-Party, the same obligation is binding also among the State-Parties themselves when such situations arise as a result of executing the cooperation request from the ICC.

A reservation that ‘the Court may not proceed with a request for surrender or assistance’ which would hinder the execution of duties of the State-Parties towards other states has a limited scope. Such a request would nevertheless be allowed provided that the ICC ‘obtains the cooperation of that third State for the waiver of the immunity’.¹⁶⁶ The consent to waive immunity practically amounts to the waiver itself. Therefore it is a necessary requirement that has to be fulfilled before the request is issued. Whether the ICC obtains the competency to ask for assistance, depends on satisfying this condition. Wirth notices that even though the concept of the free immunity waiver seems simple, the last words of this provision somehow indicate a possibility of the Court to negotiate in order to achieve a positive decision of a third state.¹⁶⁷

As soon as the request is issued to a particular state, the obligation to cooperate is created pursuant to the scope described therein.¹⁶⁸ The scholars try to find a solution to a situation in which the requested state does not feel it is its duty to execute the Court’s order. The problem lies in the competency to assess whether the third state is or is not allowed to raise the argument of internationally recognised immunity. The wording of Art. 98(1) (‘The Court may not proceed with a request’) implicitly assumes that it is for the ICC to estimate the situation at issue. The scholars refer to Rule 195(1)¹⁶⁹ in order to reduce the possibility

¹⁶⁴ Art. 98(1) of the Rome Statute.

¹⁶⁵ P. Gaeta *Official Capacity...*, p. 994; D. Akande *International Law Immunities...*, p. 425.

¹⁶⁶ Art. 98(1) of the ICC Statute.

¹⁶⁷ S. Wirth, *op. cit.*, p. 454.

¹⁶⁸ P. Gaeta *Official Capacity...*, p. 992.

¹⁶⁹ Rule 195(1) [Provision of information] reads: ‘When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending

of non-compliance with obligations related to the third states as a result of the Court's request.¹⁷⁰ On the basis of this rule both the requested state and the state affected by the request have a duty to provide information allowing the ICC to get to know the situation better which will potentially influence its decision.

In the context of joint interpretation of Articles 27 and 98(1) of the Rome Statute there is a problem of departing from some international customary law rules. It is an important issue given that the Rome Statute imposes an obligation to cooperate with it so that exercising its jurisdiction is possible. This obligation is contrary to the norms relating to the immunity of high state officials – which is supposed to be respected by all subjects of the international community. The departure from these rules, according to Gaeta, has only an effect in the vertical relations, i.e. between the ICC and its Member-States (and possibly the states that have accepted its jurisdiction *ad hoc*). However in the horizontal relations, even only among the State-Parties (although solely in the situation excluding the ICC), the customary norm on immunities is still in force and is not derogated from.¹⁷¹ This is certainly the result of Art. 98(1). The interrelation of the provisions at issue, according to Bantekas, has created a specific normative regime within a 'self-contained' system of criminal law that is valid only in front of the ICC.¹⁷² The author suggests treating Art. 27 as *lex specialis* to an international customary rule by stating that the customary rule is not annulled but only somehow omitted by the ICC.¹⁷³ This reasoning seems justified, especially because one cannot simply say that the State-Parties by signing the Statute have released themselves from other external obligations. On the contrary – the Member-States remain bound by both the obligations towards the ICC and previous commitments unrelated to the Court.

Article 98(1) of the Rome Statute in general gives a competence to the State-Parties to act consistently with the request issued by the ICC, even though in normal circumstances such action could have a detrimental effect in the international community. Such a construction allows the ICC to have a jurisdiction even over non-Member States, as long as the explicit conditions mentioned in the Statute are met. Theoretically, the only possible situation which would exclude the ICC's jurisdiction is when one enjoys personal immunity

State may provide additional information of assist the Court.'; Assembly of States Parties *Rules of Procedure and Evidence*, ICC-ASP/1/3 (Part. II-A), 3-10.09.2002.

¹⁷⁰ S. Wirth, *op. cit.*, p. 454; D. Akande *International Law Immunities...*, p. 431.

¹⁷¹ P. Gaeta *Official Capacity...*, p. 995-996.

¹⁷² I. Bantekas *Head of state immunity in the light of multiple legal regimes and non-self contained system theories: theoretical analysis of ICC third party jurisdiction against the background of the 2003 Iraq war*, 10(1) J.C.S.L. 2005, p. 29-30.

¹⁷³ *Ibidem*.

(it concerns the incumbent state officials) that derives from the international law (thus, national immunities are not effective) and only when this immunity has not been waived by the home-state of the official (for example as a result of the negotiations with the Court). Even though in theory such a situation seems to be of a marginal likelihood, in practice it constitutes one of the main bars to the ICC ‘from exercising its jurisdiction’.¹⁷⁴

In 2005 the ICC was referred to the situation in Darfur, Sudan by the UN Security Council Resolution 1593. As a result, in 2008 the Prosecutor for the Court requested the issuance of a warrant for the arrest of Bashir for genocide, crimes against humanity and war crimes. At that moment, the ICC faced the problem of issuing an arrest warrant for a sitting head of state. The Pre-Trial Chamber complied with the Prosecutor’s request by producing two arrest warrants – the first in the beginning of March 2009 and the second in July 2010.¹⁷⁵ Bashir is indeed the first incumbent high official of a state that the ICC has ever dealt with at the time of the issuance of the warrants. The international community’s response to the Pre-Trial Chamber’s decision of 2009 was very polarised.¹⁷⁶ The issues surrounding the Bashir Case such as the lawfulness of the Resolution,¹⁷⁷ whether the jurisdiction of the ICC is justified or the problem of executing the arrest warrants are intertwined with Bashir’s immunity as a sitting head of state. These situations arose because Sudan is not a State-Party to the Rome Statute and is therefore not willing to comply with the Court’s orders.¹⁷⁸

As far as the jurisdiction of the International Criminal Court is concerned, the scholars seem to agree that it was lawfully established by means of the Resolution. It is indeed one of the ways a situation may be referred to the ICC as it is provided in Article 13(b) of the Rome Statute. Since this act is deemed legal under the constitutive document of the Court

¹⁷⁴ Art. 27(2) of the Rome Statute.

¹⁷⁵ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, case no.: ICC-02/05-01/09, 4.03.2009 and *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, case no.: ICC-02/05-01/09, 12.07.2010. The Second Warrant of Arrest was a result by the Pre-Trial Chamber’s decision not including one of the grounds in the first warrant, namely genocide. Following the Prosecutor’s appeal against this decision, the Appeal Chamber reversed it and directed to reconsider by the lower Chamber. See more: S. SáCouto *Introductory note for the International Criminal Court: Appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 49 I.L.M. 992, 2010.

¹⁷⁶ The initial arrest warrant was opposed by the African Union, the League of Arab States, the Non-Aligned Movement and the Governments of Russia and China. On the other hand, NATO, Amnesty International and Genocide Intervention Network supported action taken by the ICC.

¹⁷⁷ Some interesting remarks on the topic of the whole Darfur situation as well as the choice of means by the UN Security Council may be found in the literature. See: Y. Aksar *The UN Security Council and the enforcement of individual criminal responsibility: the Darfur case*, 14(1) A.J.I.C.L. 2006.

¹⁷⁸ As a protest against the warrant, Sudan has ostentatiously expelled many Western aid agencies, such as Oxfam or Save the Children.

then one should not deny its right to proceed on the matter.¹⁷⁹ The same applies to the legality of the arrest warrant itself – it is one of the possible means that the ICC is allowed to use to ensure the appearance of the suspected persons at the trial.¹⁸⁰ Hence, by inference: if there is a rightful jurisdiction established then the actions of the ICC acting pursuant to its competency will be deemed legal as well. Gaeta makes a comparison of the circumstances of the Bashir Case with the Yerodia Case. As she points out, the arrest warrants at issue were of a different nature – Yerodia’s warrant was issued by Belgian authorities which makes it a national document, whereas the one of Bashir has an international nature since the ICC is certainly an international body that has no relation to any other subject of international law.¹⁸¹ This relates to Article 27(2), which according to her ‘restates an already existing [customary law] principle concerning the exercise of jurisdiction by *any* international criminal court’, and so the warrant might also be issued against any state, even not a State-Party to the Statute.¹⁸² She also makes a general remark that it is one thing to verify the powers of an international court to issue an arrest warrant and another thing to ensure the community’s compliance with it.¹⁸³ Therefore, it is a different matter to make sure that Bashir will be eventually caught and surrendered to the Court.

Some scholars have also discussed the problem of the fact that the arrest warrants were made public immediately. There is a choice between a sealed or secret warrant – issued only to specific countries in a way that the suspect does not know there is an order of surrender produced against him; and a public warrant of arrest – addressed to all countries that might be affected by the situation (in this case – all members of the ICC). A sealed warrant may also be unsealed by the Prosecutor and then it acts as public, as happened in the Taylor Case. The choice is not politically neutral and both warrants are supported by different arguments. In the Bashir Case, the fact that Sudan is not a State-Party to the Rome Statute played a key role and the policy reasons must have influenced the final decision. Despite the proven higher effectiveness of a sealed arrest warrant (four out of five secret arrest warrants led to successful arrests of the persons sought to surrender by the ICC), issuing this kind of document for Bashir ‘would have been practically disastrous’.¹⁸⁴ Therefore, while giving up on

¹⁷⁹ S. Williams, L. Sheriff *Case comment. The arrest warrant for President al-Bashir: immunities of incumbent heads of state and the International Criminal Court*, 14(1) J.C. & S.L. 2009, p. 79-80.

¹⁸⁰ Art. 89 of the ICC Statute.

¹⁸¹ P. Gaeta *Does President Al Bashir enjoy immunity from arrest?*, 7(2) J.I.C.J. 2009, p. 318.

¹⁸² *Ibidem*, p. 322.

¹⁸³ *Ibidem*, p. 319.

¹⁸⁴ C. Gosnell *The request for an arrest warrant in Al Bashir: idealistic posturing or calculated plan?*, 6(5) J.I.C.L. 2008, p. 842-844. As possible outcomes the author lists e.g. the fact that Sudan would most likely treat

an opportunity to arrest Bashir in the nearest future, the Prosecutor put forward other aims than that.

‘Arrest warrants are issued publicly precisely when it is apparent that the target is beyond the reach of any cooperative jurisdiction, or sheltered by states or entities that will not cooperate with the ICC. Rather than secrecy, the best chance of securing the target’s arrest is publicity designed to galvanize international and domestic opinion so that pressure will induce the noncooperative state, or rebel group, to change its ways. This involves a longer term strategy of inducements and pressure, with the ultimate aim of securing the transfer of the suspect to the ICC. In the short-term, however, public arrest warrants merely signal to the suspect that they should avoid jurisdictions where they might be arrested or surrendered.’¹⁸⁵

As is clear from the above – a public warrant has more far-reaching targets than a sealed one. One may assume that in this case the ICC does not intend to actually capture President Bashir, but is more focused on having a visible democratic impact on the tense situation in Sudan and generally establishing a better future for the African countries facing the possibility of drastic political changes. As Gosnell points out, it is not feasible to split such political considerations from international justice and so the Prosecutor of the ICC may have to become an actor on the political scene, even though his initial role is supposed to be impartial and objective.¹⁸⁶

Immunity seems to be the most striking problem in the Bashir Case. In general, Bashir as a sitting President of Sudan (in 2010 he was officially declared the winner of the elections for another tenure by the majority of 68% of the vote) is entitled to personal immunity that stems from international law. His situation is thus different from Pinochet’s or even Milosevic’s, since the latter – although sought by the warrant whilst still in office – stepped down from his function before being arrested. Therefore there has been a major discussion in the literature about how this procedural obstacle might be circumvented and various justifications have been found. It may be seen from the following that even though the methods are not completely in accordance with the legal means and that these endeavours are sometimes very risky in their reasoning, the international community seeks to overcome

such action as a *cassus belli*, aggravation of the internal conflict, ending of the peacekeeping missions or a general refusal of cooperation between the Sudanese authorities and the international community.

¹⁸⁵ *Ibidem*, p. 845.

¹⁸⁶ *Ibidem*.

immunities in order to protect values of higher importance, such as human rights or even democratic regimes (given that they secure such values).

The least convincing proposition is given by Akande, who in a very convoluted way tries to create a sort of Security Council power transposition onto the ICC. Basing this on the lawful jurisdiction of the Court and the lawfulness of the arrest warrant itself, he construes a doubtful framework:

‘Thus, all states (including non-parties) are bound to accept that the Court can act in accordance with its Statute. In this sense, at least, a non-party to the Statute is bound by the Statute in the case of a referral – in the sense that it is bound to accept the jurisdiction of the Court and legality of the Court’s operation in accordance with its Statute.’¹⁸⁷

He then claims that by means of addressing the Resolution directly to Sudan, the SC obliged it to be bound by the ICC’s decisions and thus Sudan has to obey the Statute as a whole (since this is the instrument with which the Court may act).¹⁸⁸ By such argumentation, Akande draws a conclusion that also the main Article on immunities must apply to this third state:

‘(...) The Statute, including Article 27, must be regarded as binding on Sudan. The Security Council’s decision to confer jurisdiction on the ICC (...) must be taken to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place.’¹⁸⁹

Whether the elimination of immunities is rightly considered by Akande as a jurisdictional matter is questionable. One should perhaps distinguish between confirming the existence of the jurisdiction from assessing whether there is a bar to it established by immunity. While jurisdiction is substantive in its nature, immunity is more procedural and may hinder the exercise of jurisdiction but it will not remove it altogether. In the reasoning of the scholar, there seems to be too much implicitness for the law to be construed in accordance with the legal technique. The rule of *pacta tertiis nec nocent nec prosunt* appears to be disregarded as well. Following the direct application of Article 27 to this case, Akande suggests that Bashir is not ‘entitled to [immunity] before national authorities acting in support of the ICC.’¹⁹⁰ This is somewhat ‘wishful’ thinking which would allow Akande to overcome immunity by adapting the meaning of this Article to the needs at issue.

¹⁸⁷ D. Akande *The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities*, 7(2) J.I.C.J. 2009, p. 341.

¹⁸⁸ *Ibidem*.

¹⁸⁹ *Ibidem*, p. 342.

¹⁹⁰ *Ibidem*, p. 345.

There is also another argument presented in the literature. It might be stated that the referral has constituted an implicit removal of immunity. By invoking the nature of the ICC (i.e. a court that is designed to bring to justice international criminals of every status, whether a public official of high position or not) some authors try to recreate the Security Council's decision-making process. They struggle to establish the consistency of means applied by the UN body. Therefore, assuming that all the characteristic features of the Court as well as the circumstances of the case at issue have been taken into account, the SC must have aimed at removing the procedural defence that could be raised by Bashir.¹⁹¹ Having established such reasoning, it is a natural consequence that Sudan, a UN Member, is bound by the Resolution. Nevertheless this proposition is more coherent with regards to the main target of Resolution 1593, i.e. capturing the suspect, yet again it seems some extra value is added to the wording of the document, as if in order to make sure immunity will not be an obstacle to the proceedings at any cost.

Ssenyonjo sums up three ways in which the immunity problem might be evaded by the Resolution. Firstly, the abovementioned possibility suggested by Akande. Secondly, addressing the Resolution directly to Sudan in the operative paragraph 2 must have lifted immunity with regards to this state. Thirdly, an assumption that the provision of Article 27(2) restates an international customary rule eliminating immunity with respect to internationally established courts, like the ICC.¹⁹² The second option deserves some more attention. The paragraph mentioned reads:

‘(...) the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully’.¹⁹³

The UN Security Council clearly demands Sudan's compliance with the Resolution and obliges it to full cooperation as well as 'any necessary assistance'. According to the author, this establishes an implicit removal of immunity. Since such reasoning is difficult to be legally justified, it might be safer to assert that the wording constitutes an order directed to Sudan to waive all the immunities which might hinder the ICC's jurisdiction. This

¹⁹¹ S. Williams, L. Sherif, *op. cit.*, p. 80.

¹⁹² M. Ssenyonjo *Case comment. The International Criminal Court arrest warrant decision for President Al Bashir of Sudan*, 59(1) I.C.L.Q. 2010, p. 211-212.

¹⁹³ UN SC Resolution 1593 (2005), S/RES/1593 (2005), 31.03.2005, para. 2.

is connected to another proposition presented by the same author: namely, the obligations of Sudan flowing from being a signatory to the Rome Statute. Although not a State-Party, on the 8th of September 2000 Sudan signed the Statute.¹⁹⁴ It is well established in international public law that such behaviour indicates the state is considering a possibility of further ratification of the document. Moreover, such action has implications in the future legal sphere of the state – it is obliged to ‘refrain from acts which would defeat the object and purpose of a treaty’,¹⁹⁵ while the Rome Statute aims at bringing to justice all persons involved into commission of the international crimes. Hence, until Sudan had officially unsigned the Statute,¹⁹⁶ it was illegal for it to persist in hindering the exercise of the ICC’s jurisdiction. Since its notification was effected, no obligations arise from the signing of the Rome Statute. Therefore, one may argue that from the point when the first Arrest Warrant was issued (i.e. 4 March 2009) until Sudan’s explicit announcement of no intention to become a State-Party (i.e. 26 August 2009) there were several months during which Sudan was still to act consistently with the purpose of the ICC Statute. Unfortunately, this solution would not apply to the Arrest Warrant issued on the grounds of alleged crime of genocide. This however, seems to be a convincing structure developed using the legal instruments and a means of inference consistent with the legal technique applied by the doctrine.

In strong opposition to Akande’s idea, Gaeta firmly disagrees with the possibility that through the Resolution Sudan ought to be treated as a State-Party to the Statute.

‘Nonetheless a referral by the Security Council is *simply* a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute. This very simple fact was implicitly recognized by the Chamber itself, where it stated that “the current position of Al Bashir as a Head of state which is not party to the Statute” does not bar the exercise of the jurisdiction of the Court in the present case.’¹⁹⁷

The author protects the position of the third state which has not agreed to be bound by the provisions contained in the Statute. In her opinion, the Pre-Trial Chamber was right to invoke Article 27 of the Statute as it is a provision of a high importance, however it has used a wrong

¹⁹⁴ M. Ssenyonjo, *op. cit.*, p. 212.

¹⁹⁵ Art. 18 of the VCTL.

¹⁹⁶ Unsigning a treaty needs to be properly announced to the international community. Sudan did it by notifying the UN Secretary-General; see: Depositary Notification, C.N.612.2008.TREATIES-6, 27.08.2008.

¹⁹⁷ P. Gaeta *Does President Al Bashir...*, p. 324; emphasis added.

line of argumentation. It should have been said, according to Gaeta, that the customary law principle inherent in paragraph 2 applies to nationals of both the State-Parties and the third states as far as proceedings before an international court are concerned. Therefore, Bashir is not entitled to immunity, however only by means of that customary rule, not the fact that it is restated in the ICC Statute.¹⁹⁸ It is fearless of the author to hold that position, especially because it is therefore stretched over the nationals of non-members of the ICC, as long as the events are happening in front of an international court.¹⁹⁹ Gaeta's argument is that one cannot become a party of a treaty if there was no official action on that matter, e.g. by its ratification. Although it seems rather obvious, it is at the same time very often ignored by some of the other authors.

One may claim that in one or another way presented above Bashir's immunity is successfully removed. It has to be therefore established whether the states are free to act in consistency with the Arrest Warrant when Article 98(1) is considered. In general, depending on the reasoning accepted in the first place, a solution to this problem is suggested. There may be three groups of states distinguished: Sudan as a state of its own kind, State-Parties to the Rome Statute and third states, unrelated to the ICC. There seems to be a general agreement among the scholars that Sudan is obliged to respect the Resolution, as well as all the means that have been used to execute it by the ICC. Since the referral is rightful and the ICC has been given jurisdiction over the situation in Darfur, Sudan should cooperate and 'provide all necessary assistance to the Court and the Prosecutor'.²⁰⁰ Nonetheless, it is very unlikely that such cooperation will be obtained and that the Government will willingly surrender Bashir to the ICC.²⁰¹ As far as State-Parties are concerned, Article 98(1) plays a major role. Since two options are possible – either immunity is implicitly removed by the Resolution or other legal endeavours or it still exists and may be invoked by Bashir – two resulting situations are plausible. If there is no immunity, Article 98(1) has no relevance to the case and State-Parties are free to arrest the Sudanese head of state whenever there is such an opportunity.²⁰² However, if one holds that Bashir is nevertheless protected by immunity

¹⁹⁸ *Ibidem*, p. 324-325.

¹⁹⁹ A change in Gaeta's opinion may be noticed – in her previous article (*Official Capacity...*) of 2002 she merely claimed an existence of a rule that is valid only among the State-Parties. In 2009 she states that Art. 27(2) shows 'the irrelevance of the rules on personal immunities (national and international) for the exercise of jurisdiction by any international courts' and it 'applies to nationals of states not parties to the ICC Statute' (see: P. Gaeta *Does President Al Bashir...*, p. 324-325). This again reflects the need of the scholars as well as the international community as a whole to remove the application of immunities when serious crimes are at issue.

²⁰⁰ The UN SC Resolution 1593, para. 2.

²⁰¹ S. Williams, L. Sherif, *op. cit.*, p. 84.

²⁰² D. Akande *The legal nature...*, p. 342.

ratione personae, Article 98(1) is used to solve the problem. Ideally, it should have been dealt with before the Arrest Warrant was issued and ought to have been preceded by Sudan's waiver of immunity. This was not the case thus State-Parties have to choose between obeying the ICC's decision and a threat of infringing international law by ignoring Bashir's immunity. Some authors suggest addressing the question of Article 98(1) applicability to the Pre-Trial Chamber. It would most likely decide that it is not to be used in this case, especially when its reasoning is inherent in the Arrest Warrant decisions.²⁰³ According to Gaeta, a state acting pursuant to the ICC's request would indeed commit an international wrongdoing, however it would not have an effect on the jurisdiction.²⁰⁴ The principle *male captus bene detentus* may apply here.²⁰⁵ Finally, the situation of third parties should be evaluated. There is no obligation put on them by the Resolution²⁰⁶ and they can decide only on a voluntary basis to participate in the capturing of the suspect. A reliance on the implicit removal of immunity made by the Security Council would be advisable in order to avoid negative consequences from the international community.²⁰⁷

The Bashir Case is definitely a landmark in the ICC case-law. It is an important moment for all of international criminal law as this breakthrough case regards an incumbent head of state. It remains unknown how will the situation develop, however the scholars are unanimous in attempting to circumvent immunities in order to secure other values such as human rights. It will probably take years to bring Sudan back to normality and to exert a regime-change there. The Bashir Case has already significantly influenced the evolution of the aspect of international law concerning immunities.

2. Immunity in relation to exercise of the universal jurisdiction and to *ius cogens* norms

a. The status of immunity law after its repeal in the Nuremberg and Tokyo trials

Individual criminal responsibility of persons, among them high state officials, who were engaged in criminal conduct of an international scale has become significantly more important after the Second World War. The necessity of prosecuting the perpetrators of the

²⁰³ S. Williams, L. Sherif, *op. cit.*, p 86-87.

²⁰⁴ P. Gaeta *Does President Al Bashir...*, p. 331-332.

²⁰⁵ *Ibidem*.

²⁰⁶ The Resolution reads: 'while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully', para. 2

²⁰⁷ S. Williams, L. Sherif, *op. cit.*, p. 88.

atrocious deeds committed in that time was urgent and the international community had decided to take all indispensable steps in order to administer and restore justice. In August 1945 the United Kingdom, the United States, France and the Soviet Union – known as the Big Four, signed the London Agreement, which in Article 1 established the International Military Tribunal (hereinafter the IMT) ‘for the trial of war criminals’. The Nuremberg Charter – the statutory instrument of the IMT,²⁰⁸ was annexed to this document and its provisions have played an important role in the future.

Not so long after this event, in January 1946, another international body was created – the International Military Tribunal for the Far East (hereinafter the IMTFE). Its statute, the Tokyo Charter,²⁰⁹ was based on the wording of the preceding Tribunal.

From the present point of view, one would not be mistaken to say that the work of the aforementioned Tribunals laid the foundations of modern international criminal law and individual responsibility for international crimes. The IMT dealt with the previous state of international law and reached the conclusion that there was a huge revolution in the international community’s opinion on the matter:

‘It was submitted that International Law is concerned with the actions of sovereign States and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State.’²¹⁰

The Tribunal rejected these arguments and stated that the fact that international law ‘imposes duties and liabilities upon individuals as well as upon States has long been recognized.’²¹¹ By these words, criminal responsibility of individuals for violations of international law became firmly established. Further on, the IMT focused on – as the Tribunal named it – the principle of international law which allows certain representatives of the state to be immune for specific acts committed under the protective cloak of the state. It concluded that when

²⁰⁸ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 82 U.N.T.S. 280, London, 8.08.1945, see: <http://www.unhcr.org/refworld/docid/3ae6b39614.html>, accessed on 11.05.2011; hereinafter the Nuremberg Charter.

²⁰⁹ United Nations, *Charter of the International Military Tribunal for the Far East*, TIAS. No. 1589, 4 Bevans 20, Tokyo, 19.01.1946, amended 25.04.1946, see: <http://www.legal-tools.org/doc/a3c41c/>, accessed on 11.05.2011, hereinafter the Tokyo Charter.

²¹⁰ *Judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, the International Military Tribunal, Part 22, KZ1176.G67 1947 at Classified Stacks, 22.08.1946 - 1.10.1946; see: <http://www.legal-tools.org/doc/45f18e/>, accessed on 11.05.2011, p. 446.

²¹¹ *Ibidem*.

a commission of international crimes is at issue, those responsible cannot be sheltered ‘behind their official position in order to be freed from punishment.’²¹² This is confirmed in the respective Articles of the Charter. The reasoning of the Tribunal was that the international obligations of individuals stem from the obedience imposed by their home-states. The possible actions of the states are limited however by international law itself; and the commission of war crimes cannot be considered as falling within their legal range of their authority. Therefore, since the states in this situation would act outside their competence, their officials must not be protected by immunity. This is a clear reference to the distinction of acts *de iure imperii* and *de iure gestionis*.

Indeed, the Nuremberg Charter includes a provision which repeals the rule of granting immunity to persons holding an official position (‘whether as Heads of State or responsible officials in Government Departments’).²¹³ A similar norm, providing however for the possibility of mitigation of the punishment, may be found in the Tokyo Charter.²¹⁴ The final judgements of the Tribunals were based on a set of principles inherent in the respective Charters, which were further formulated and adopted by the International Law Commission and then affirmed by the UN General Assembly in 1946. Two principles are of importance when immunity matters are concerned. These are:

- ‘I. Any person who commits an act which constitutes a crime under international law is responsible therefor (*sic!*) and liable to punishment. (...)
- III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.’²¹⁵

The first principle contains the wording ‘any person’ which indicates that regardless of status (official or not), any person may be tried for the commission of international crimes.²¹⁶ This is a general assumption which is specified in the third rule, directly referring to the official positions and protection available thereto. In the latter principle, the ILC decided not

²¹² *Ibidem*, p. 447.

²¹³ Art. 7 of the Nuremberg Charter.

²¹⁴ Art. 6 of the Tokyo Charter states: ‘*Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, or itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires;*’ (emphasis added).

²¹⁵ *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries*, Y.I.L.C. 1950, vol. II.

²¹⁶ J.J. Paust, M. Scharf, J. Gurulé, L. Sadat, B. Zagaris, S. A. Williams *International Criminal Law. Cases and materials*, 2nd edition, Durham 2000, p. 30-31.

to include the mitigation part, leaving it to the considerations of a competent court.²¹⁷ The principles on the irrelevance of immunity, having been officially confirmed by the UN, have existed in international law since then and were repeated numerous times by various international documents. One may therefore argue that they have evolved into a norm of customary international law.

It has been argued above²¹⁸ that a plethora of international documents, such as statutes of the international tribunals, refer to the so-called irrelevance of an official position when the commission of international crimes is concerned. This applies to the functional immunity, leaving the personal immunity dependant on the actions of the interested states (e.g. a waiver of immunity). Irrelevance of official capacity is commonly known as exception to immunities. This would indicate that the norm on immunity is given a high status in the hierarchy of international law sources. It might seem unusual to consider the customary status of the exception to a rule whilst denying such nature of the rule itself, attention to the latter problem is given later herein and the focus at this point should remain on the former issue. Indeed, it is impossible to talk about an exception to a rule when the rule might not be confirmed, therefore the right solution may be to establish the individual relevance of the exception by granting it a separate status as a principle of international criminal law.

Zappalà, in questioning the French Cour de Cassation judgement in the Qaddafi Case, among other objections, blatantly exposes its failure in recognising the proper legal status of the exceptions to functional immunity.²¹⁹ He states that ‘there are various elements for contending that the irrelevance of functional immunity for international crimes amounts to a norm of international customary law’.²²⁰ These elements are further enumerated. Firstly, the aforementioned international documents may form and be evidence of the customary law. It is well known that such is the common way a customary rule evolves – at the beginning it exists as an international practice and then it is reinforced by means of its inclusion in conventional sources of law. The next arguments presented by the author are the provisions of the Nuremberg Charter and the principles affirmed by the General Assembly of the United Nations (hereinafter the GA) as well as the provisions of the statutes of the international

²¹⁷ This seems related to the fact that the Tokyo Charter contains different regulation on that matter. See: *Principles of International Law...*, para. 103.

²¹⁸ See Ch. I (1)(a) & Ch. II (1)(a).

²¹⁹ S. Zappalà *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 E.J.I.L. 2001, p. 596.

²²⁰ *Ibidem*, p. 602. Admittedly, the author considers the exception as being applicable towards crimes under international customary law, however as it will be argued later (see Ch. II (2)(b)) the prohibition of these crimes may be given the nature of *ius cogens*.

criminal tribunals, together with the ICC.²²¹ By this reasoning, the position adopted by the Avocat général in the Qaddafi Case (and thus also the final opinion of the Court, as it has accepted the Avocat's line of argumentation in this field) is thoroughly criticised and deemed erroneous. Therefore, it may be definitely stated that the irrelevance of official capacity in international criminal law with regards to functional immunity has acquired customary law status, after being inserted in the meantime into numerous treaties and other documents of international value.

Having achieved so much in the field of individual criminal responsibility, the international community – the international courts included – still surprisingly errs badly when immunities are at issue. Granting a customary character to the IMT's principles set out by the ILC, among other subsequent international instruments, seems to be justified, especially when opposed to the common misconception that the rule of immunity of state officials has a customary law value. The exceptions to this rule are indeed more common than the appreciation of the rule itself.²²² Certainly the case law surrounding immunity of high state officials, even though very extensive, is not unanimous and unequivocal. The courts use various reasoning in order to either support the existence of immunity or its non-applicability. Basing their judgements mainly on conventional law rather than thoroughly examining customary law, they draw wrong conclusions.²²³

It appears almost impossible to find a clear line of case law that would not be itself contradictory. Orakhelashvili has noticed that whereas the courts in general presuppose the customary character of the norms regarding the granting of immunities to high state officials,²²⁴ there is a twofold method of justifying the opinion that they should not apply in some cases. These are the most common exceptions applied by the courts, namely: a) the assertion that certain acts are kinds of state *de iure gestionis* acts²²⁵ and so they do not have an official character, or b) they amount to breaches of *ius cogens* norms.²²⁶ The second proposition is however inherent in the first, since it is obvious that violations of *ius cogens* rules cannot stay within the legal scope of state's authority. The commission of an international crime for example constitutes such an explicit infringement.²²⁷ Following

²²¹ *Ibidem*, p. 602-604.

²²² A. Orakhelashvili *Peremptory norms in International law*, New York 2007, p. 338.

²²³ S. Zappalà, *op. cit.*, p. 602.

²²⁴ A. Orakhelashvili, *op. cit.*, p. 338.

²²⁵ On the distinction between official and private acts of state representatives see herein, Ch. I (1)(a).

²²⁶ A. Orakhelashvili, *op. cit.*, p. 325.

²²⁷ See more on the master of relation of immunity to breaches of *ius cogens* norms herein Ch. II (2)(b).

that line of argumentation, the author claims that the courts seem to take an outdated stance on state immunities²²⁸ and tend to disregard the development of international law which took place after the Nuremberg and Tokyo trials. There has been a move from absolute immunity to a restrictive one. The former does not distinguish between official and private acts and applied no matter what the circumstances of the case are and the latter does not include acts that by definition stay ‘outside the functions of a State, such as breaches of international *jus cogens* including serious violation of the rights of an individual’.²²⁹ Moreover, Orakhelashvili reproaches the courts for taking a short cut in the decision-making process by not paying enough attention to the actual state of customary law. He warns that ‘the existence of generally recognised or firmly established rules may not simply be assumed’, as ‘it must be established through careful evidence’.²³⁰

Such a critical stand was also taken by Judge Van den Wyngaert in her dissenting opinion to the Yerodia judgement.

‘Before reaching this conclusion [that incumbent Foreign Ministers enjoy immunities on the basis of customary international law], the Court should have examined whether there is a rule of customary international law to this effect. (...) Identifying a common *raison d’être* for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing. (...) In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of state practice (*usus*) and *opinio juris* to the effect that this rule exists.’²³¹

It seems desirable to ask why the courts take this kind of approach to immunity cases. There is indeed some practice of granting immunities to foreign officials among states. However according to the scholars, it appears to be more a matter of comity, reciprocity and interest – or in other words – custom in general rather than customary law.²³² The states,

²²⁸ The author contends that the immunity of state officials derives directly from the State immunity and the changes of the latter entail the changes in the former.

²²⁹ A. Orakhelashvili, *op. cit.*, p. 333. It should be noted however that it is the functional immunity that the author means when saying that it is restrictive. It cannot be unarguably stated that there is no personal immunity in these cases – they still maintain and only a little shift in its usage is now noticeable. See more on the possible evolution of immunity *ratione personae* - S. Zappalà, *op. cit.*, p. 605-607.

²³⁰ *Ibidem*. The author points out the ICJ’s decision in the Yerodia Case which based its argument on the Pinochet and Qaddafi cases, clearly missed out the fact that the Courts in relevant judgements differed much when it came to the essential decision on immunities. See more: *Ibidem*, p. 338-339.

²³¹ The Yerodia Case, *Dissenting Opinion of Judge Van den Wyngaert*, para. 11-12.

²³² *Ibidem*, para. 13; A. Orakhelashvili, *op. cit.*, p. 338.

while acting in accordance of their policies and individual interests, ‘have abstained from prosecuting foreign ministers or other comparable officials of other states (...) by considerations of courtesy’.²³³

A few conclusions may be drawn from the deliberations made above. First of all, the Nuremberg trial commenced a whole new period of international criminal law development and individual responsibility of the perpetrators was established. In the same manner, it has influenced the formation of a new rule of customary international law, namely the irrelevance of official capacity. Many provisions of subsequent treaties were based on the famous third principle of international law recognised in the Nuremberg Charter and the IMT’s judgement. Secondly, the international criminal tribunals in the majority of the following case law have failed to notice this crucial change in the law of both state immunity and immunities of high state officials. This led to confusion and the lack of distinctness among the scholars as well as other international bodies taking their decisions based on the previous precedents. Thirdly, the courts tend to take a shorter way when it comes to adjudicating on the matter of immunities and simply assume there is a rule of customary law which grants protection to foreign state officials. However, as was remarked by some authors, there is neither sufficient *usus* in the international community, nor *opinio iuris* which definitely agrees on the existence of such rule. Therefore, as a conclusion, a character of two norms ought to be established. On one hand, there is the norm granting immunity to foreign officials in international criminal law which is a rule of comity and reciprocity, having no support in customary law. In that way the rule of immunity might be considered *ius dispositivum*,²³⁴ as its shape is fully dependant on the individual decision of states. On the other hand, the norm of irrelevance of official capacity when an alleged commission of international crimes is of customary law nature, built on strong historical and legal foundations. To these two types of norms another one should be added: *ius cogens* norms outlawing the commission of international crimes.

²³³ A. Orakhelashvili, *op. cit.*, p. 339.

²³⁴ By the characteristics given by Orakhelashvili: ‘(...) *jus dispositivum* is relative and States are masters of norms in their *inter se* relations. State attitudes as to their interpretation, application and remedies for violation of *jus dispositivum* can qualitatively resemble derogation. (...) *Jus dispositivum* is derogable (*sic!*) in every aspect: substance, invocation, remedies, or validation of a breach.’ This, according to the author, may be directly transposed to immunities: ‘To argue the contrary is to portray immunities as a special class of rules somehow comparable to *jus cogens*. But this is not easy to prove: immunities may be waived, renounced, derogated from or breached by way of reciprocity or countermeasures. Thus, immunities, if and to the extent they exist in international law, are subject to the operation of the international public order in the same way as any other norm is.’ See: *Ibidem*, p. 71 and 342.

b. The relationship between *ius cogens* norms and immunity

A hierarchical perspective was suggested by Orakhelashvili as a solution to issues surrounding the application of immunity protecting foreign representatives when they are charged with the commission of an international crime. Having discussed the lack of customary nature of the law on immunities, there is a contradiction inherent in the idea itself: there should be no conflict with peremptory norms since there is no law on immunity present in the current state of international law. However such a relationship should be considered and it is because of the fact that the courts do sometimes assume the prevailing status of immunity over the character of prohibition of international crimes.²³⁵

Article 53 of the VCLT defines *ius cogens* as ‘a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. This unique highest status among other norms of international law has been awarded to the proscription of the most atrocious crimes,²³⁶ torture or crimes against humanity being the most often example. Thus, there is no doubt that in opposition to other norms – namely *iuris dispositivi* – peremptory norms shall prevail.

In these circumstances it is really incomprehensible how international tribunals may be so mistaken in interpreting the norms on a different level of hierarchy.²³⁷ One of the answers given by the scholars is an alleged distinction between substance and enforcement of *ius cogens*. ‘While peremptory norms are accepted in international law and bind states, they do not possess superior force with regard to their effect and enforcement’²³⁸ – and by these means *ius cogens* would be substantive in nature, whereas immunities would be essentially procedural in hindering the prosecution of high state officials. One cannot agree with such a concept – it would actually create an unreasonable conflict in the peremptory norms themselves.²³⁹ Another striking argument was given in the Qaddafi Case by the Avocat

²³⁵ *Ibidem*, p. 340.

²³⁶ M. Shaw, *op. cit.*, p. 117; W. Czapliński, A. Wyrozumska, *op. cit.*, p. 22.

²³⁷ ‘*Jus cogens* not only postulates the hierarchy between conflicting interests, but provides, by its very essence, the legal tool of ensuring the maintenance and continuous operability of this hierarchy, depriving conflicting acts and transactions of States of their legal significance.’ A. Orakhelashvili, *op. cit.*, p. 68.

²³⁸ *Ibidem*, p. 340.

²³⁹ Orakhelashvili in response to this proposition points out its several flaws: the lack in international law of a clear division into procedural and substantive rules, the fact that breaches of *ius cogens* are by definition outside the scope of immunity which indicates effectiveness of peremptory norms apart from their substantial influence and lastly the bond between *ius cogens* and universal jurisdiction which points out the procedural effect in their application. See more: *Ibidem*, p. 341.

général. In an attempt to avoid the effect of *ius cogens*, he tried to argue that they are binding only by conventional means, i.e. Article 53 of the VCLT. Since France was not a party to the Convention, he was trying to prove that peremptory norms would not in this specific case prevail over other norms and therefore immunity should be awarded to Qaddafi. However, the Avocat failed to notice that France is bound by these norms like any other country, since they exist not only in the conventional form but also even more likely as a form of customary law and thus cannot be created by the sole Article defining them.²⁴⁰

As a conclusion, when immunities clash with peremptory norms, the former shall be considered less important. It is obvious that they are inferior to rules of the highest level in the hierarchy of international law. *Ius cogens* are effective both towards personal and functional immunities of high state officials. The former effect may however be influenced by particular circumstances of the case. Unnecessary harassment of heads of state in office can be avoided by deferring temporarily their prosecution²⁴¹ and expecting their cessation from the position held.

c. Persecution of deeds infringing *ius cogens* norms as an exercise of universal jurisdiction

The concept of *ius cogens* is essentially intertwined with universal jurisdiction. It is well established that the most atrocious international crimes for which an individual may be held responsible and which are outlawed by *ius cogens* norms are regarded as those over which the principle of universality is stretched.²⁴² Although prosecution of any international crime is not automatically given to all of the states concerned,²⁴³ the widening of its scope is visible in the literature. After, according to Shaw, only piracy and war crimes were included beyond all doubts (crimes against humanity and crimes against peace with more hesitation) – slavery, genocide and torture were more recently added by another scholar.²⁴⁴ Indeed in 2005 the Institute of International Law confirmed that universal jurisdiction is to be exercised over genocide, crimes against humanity and war crimes.²⁴⁵ Lord Millett in the Pinochet Case proposed a test for universal jurisdiction:

‘In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied.

²⁴⁰ *Ibidem*, p. 356.

²⁴¹ *Ibidem*, p. 356-357.

²⁴² A. Orakhelashvili, *op. cit.*, p. 354.

²⁴³ M. N. Shaw, *op. cit.*, p. 597.

²⁴⁴ *Ibidem*, p. 593-594; A. Aust *Handbook of International Law*, New York 2005, p. 45-46.

²⁴⁵ Found online: http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf, accessed on 14.05.2011.

First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.²⁴⁶

The idea of universal jurisdiction is that a state acts on behalf of the whole international community in prosecuting the perpetrators of these crimes and are awarded a competence to do so by the whole community.²⁴⁷ Moreover, it is stated in the doctrine, that in certain circumstances the states are obliged to exercise the jurisdiction of this kind.²⁴⁸ It is important to notice however, that this duty is not itself a peremptory norm – it can only have a conventional foundation and as such cannot be exercised by individuals.²⁴⁹ A significant impact of the implementation of the ICC Statute to the national legislation in that matter can be observed. As a result of the principle of complementarity in the Rome Statute and the duty to cooperate, universal jurisdiction is reflected in the national laws of the State-Parties.²⁵⁰

The scholars (alongside some Judges dissenting with the final decision of the court in the Yerodia Case) essentially agree that when the three aforementioned factors connect, immunity shall be deemed irrelevant.²⁵¹ Once there is an international crime established on the level of *jus cogens* and prosecuted on the basis of universal jurisdiction – such a norm shall prevail against the rule on immunities of high state officials. Irrelevance of immunities was also an important outcome of the Pinochet Case, in which the Lords suggested a test for a treaty crime to check whether all the conditions are met in order to remove immunities. On the example of torture, they enumerated: gravity, recognition in custom (which together amounts to a *jus cogens* norm) and the universality of jurisdiction through a treaty (because the crime is enshrined in the treaty itself).²⁵²

²⁴⁶ Lord Millett in the Pinochet Case, p. 275.

²⁴⁷ *Ibidem*, p. 276.

²⁴⁸ The Yerodia Case, *Dissenting Opinion of Judge Van den Wyngaert*, para. 46; *Dissenting Opinion of Judge Al-Khasawneh*, para 7; A. Orakhelashvili, *op. cit.*, p. 288-307.

²⁴⁹ R. Van Alebeek, *op. cit.*, p. 221.

²⁵⁰ R. Higgins *Themes and Theories. Selected Essays, Speeches and Writings in International Law*, vol. 1, New York 2009, p. 416.

²⁵¹ A. Orakhelashvili, *op. cit.*, p. 355; the Yerodia Case, *Dissenting Opinion of Judge Van den Wyngaert*, para. 28; *Dissenting Opinion of Judge Al-Khasawneh*, para 7.

²⁵² N. Boister, R. Burchill, *op. cit.*, p. 437-438. In the words of the authors the three characteristics are, explicitly: 'First, the treaty itself is a response to a practice that shocks the conscience of mankind and violates the *civitas maxima*. (...) Second, the gravity of this normative breach is confirmed by its recognition in customary international law. (...) Third, the treaty reflects the growing international concern with torture in all its forms and particularly in the extension of universal jurisdiction in domestic courts over acts of torture committed by public officials.'

The considerations above lead to an inevitable conclusion – immunity is worthless when clashed with international crimes outlawed by peremptory norms. First of all, it happens by means of customary law (since the rules on immunity can only be considered as comity or reciprocal reaction of the states) which defines the irrelevance of an official position when a commission of international crimes is alleged. Secondly, given that these crimes are prohibited by *ius cogens*, any conduct against them amounts to a breach of peremptory norms which in any case cannot be concealed in international public law. Thirdly, because universal jurisdiction stretches over international crimes violating *ius cogens*, immunity shall be disregarded and perpetrators brought to justice which is administered by international courts created especially for that purpose. In words of the scholar: ‘it must be accepted that the principles of immunity have no peremptory status and the conflict between the two sets of norms must be resolved considering the framework of normative hierarchy giving primacy to the relevant peremptory norms.’²⁵³ Thus, a hierarchy of importance of the relevant factors may be established: on the lowest level is the immunity and its application as a basic norm (*ius dispositivum*), irrelevance of official capacity as a customary law rule and finally – at the highest level – the prescription of international crimes by *ius cogens* norms.

²⁵³ A. Orakhelashvili, *op. cit.*, p. 343.